No. 240

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANK CARMINE NARDONE, NATHAN W. HOFFMAN, AND ROBERT GOTTFRIED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

No opinion was rendered by the District Court of the United States for the Southern District of New York. The opinion of the Circuit Court of Appeals (R. 358–363) is reported in 106 F. (2d) 41.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 28, 1939 (R. 364). The petition for a writ of certiorari was filed July 28, 1939, and granted October 9, 1939. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

This Court in granting the petition for writ of certiorari limited its review "to the question whether the trial court correctly disposed of petitioners' claim that a portion of the respondent's evidence was procured through the illegal interception of telephone and telegraph messages and the question of the propriety of a preliminary inquiry to ascertain that fact."

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605), provides that—

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and

no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

STATEMENT

Petitioners, together with certain other defendants, were convicted in the United States District Court for the Southern District of New York on an indictment (R. 10–21) charging in two counts the smuggling and concealing of alcohol in violation of the Tariff Act of 1930 (U. S. C., Title 19, Sec. 1593 (a) and (b)),

and in the third count a conspiracy to smuggle and conceal alcohol in violation of Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88). A verdict of guilty on all counts was returned on March 23, 1939 (R. 7, 326–327). On March 24, 1939, the petitioners were sentenced as follows (R. 7–8, 328–334): Frank C. Nardone to a term of two years on each count, to run concurrently, and a fine of $3,000; Nathan W. Hoffman to a term of two years on each count, to run concurrently, and a fine of $2,500; Robert Gottfried to a term of one year and one day on each count, to run concurrently.

Upon appeal to the Circuit Court of Appeals for the Second Circuit by the petitioners the judgments of conviction were unanimously affirmed (R. 358–364).

The outline of the conspiracy as developed by the Government's testimony at the trial was as follows: Early in 1935 one William Kleb was operating a rum-running boat the "Monololo," out of Freeport, Long Island (R. 60, 102). Adrian Van Austin and Floyd Lancaster were members of the crew (R. 102) and petitioners Hoffman and Nardone were interested in the operation (R. 103–104). The "Monololo" sank in January 1935, and the crew was picked up and identified by New York State Troopers (R. 102, 296–297). Kleb transferred Lancaster to another rum-running vessel called the "Ganiff" (R. 193). In July 1935, Kleb's operation was merged with another bootlegging conspiracy theretofore operated by co-conspirators LeVeque and Bert

Erickson (R. 104). LeVeque and Erickson operated a vessel known as the "Isabel H" under the command of one Ducose, and Lancaster was transferred to this boat (R. 67, 104). Later Lancaster and Van Austin were shifted to another of LeVeque's boats, the "Pronto." The "Isabel H" was used as the offshore boat; the "Pronto" was used to bring the liquor to shore. On October 6, 1935, the "Pronto" was rammed by the Coast Guard Cutter "Argo" which had been trailing it at least as early as September 9 (R. 117, 118). While the "Pronto" was being repaired, meetings relative to rum-running operations were held at the Hotel Astor and the Normandie Restaurant in New York. These meetings were attended by Nardone, Hoffman, Erickson, LeVeque, Kleb, Geiger and Velez (R. 33, 35, 98, 179). Geiger was a radio operator who was employed about this time and furnished with equipment for maintaining ship-to-shore communication during the bootlegging operations (R. 32–35). Velez, a sea captain formerly employed by LeVeque in rum-running, was seeking employment with the conspirators about this same time (R. 178–180).

The "Pronto" was repaired and put into service again, running liquor into Keansburg, New Jersey, from the "Isabel H". (R. 106.) On November 22, 1935, Alcohol Tax Unit investigators arrived at the Keansburg pier where the "Pronto" had just unloaded 750 gallons of alcohol (R. 78, 245). LeVeque and co-conspirator Saunders were identified by these investigators as being present at this time (R. 247–

249). After the confiscation of the cargo at Keansburg the conspirators shifted their operations to South Carolina (R. 82–85). But on January 20, 1936, the "Pronto" was captured by a coast guard cutter while running a load of alcohol ashore (R. 137). The "Isabel H" escaped (R. 123). In March, 1936, following efforts by Velez (R. 183), Nardone, under the name of Edmond, arranged for the use of a vessel called the "Southern Sword," owned by defendant Callahan, with defendant Hugh Brown in command (R. 187–188, 193–194). Valez became chief mate (R. 187). The "Southern Sword" received a cargo of alcohol from the "Isabel H" and brought it in to New York harbor (R. 189–190). Petitioner Gottfried, a part owner of the smuggled cargo (R. 188), arranged to have Callahan taken out to meet the "Southern Sword" (R. 240–244), and the liquor was unloaded on March 17, 1936 (R. 190–191). Nardone, LeVeque, and others were arrested on March 20 at the Belfort Restaurant, a place frequented by the conspirators. Petitioner Gottfried was present and attempted to conceal certain incriminating papers (R. 172–173).

An indictment similar to the one in the present case was returned against Nardone, Gottfried, Callahan, Brown, and LeVeque (Government's Brief in Circuit Court of Appeals, p. 4). LeVeque pleaded guilty. The remaining defendants stood trial and were found guilty. The convictions were reversed by this Court in *Nardone* v. *United States*, 302 U. S. 379, because of the introduction of certain interstate telephone

communications of the defendants which had been intercepted by agents of the Government. A new indictment was filed, naming all the defendants in the original case except LeVeque, and in addition Nathan W. Hoffman and Bert Erickson. Erickson pleaded guilty to the conspiracy count (R. 23). The remaining defendants were convicted after trial.

None of the intercepted communications was introduced in evidence at the trial in the instant case. The Government made its case almost entirely upon the testimony of participants in the conspiracy (e. g., Geiger, Velez, Kleb, Lancaster, Murphy), and persons with or through whom the conspirators did business (e. g., employees of telephone and telegraph companies, tugboat and shipyard operators, and restaurant proprietors). Testimony by Government agents was limited to facts personally observed; e. g., coast-guard employees testified to the trailing of defendants' boats; Alcohol Tax Unit investigators testified to meetings of the conspirators at hotels and restaurants, and identified certain alcohol exhibits. Petitioners' connection with the conspiracy, as recognized by the court below (R. 359–360), was clearly established by the evidence (Nardone, R. 31–32, 35, 36, 38, 40, 98, 145, 148, 152, 158, 180; Hoffman, R. 31–32, 35, 36, 98, 103, 144, 158, 180, 214; Gottfried, R. 40, 144, 158–161, 164, 165, 172–173, 203, 242).

Early in the trial in the instant case, during the examination of the first witness, George Geiger (R. 41), defendants called the attention of the court

to a motion which they expected to make with regard to the testimony of the witness, but the actual motion was not made until the witness had completed his testimony. At that time (R. 46), the defendants moved that Geiger's testimony be stricken on the ground that his evidence had been "obtained by the unlawful interception of telephone and telegraph messages" by means of wire tapping, in violation of Section 605 of the Communications Act of 1934, and that "the existence of the witness, the fact that he was a witness to some of the transactions and the relations between the defendants and of the witness with the defendants and other persons alleged to be cooperating with them" were revealed by the unlawful interceptions. At this time the court announced that the matter would be taken up later in the trial (R. 46).

At the close of the second witness' testimony, defendants again objected and offered to prove that the very existence of Geiger and his connection with the defendants' transactions were learned by wire tapping. After some colloquy (R. 50–52), the court allowed counsel to state in the record what offer of proof would be made. This statement was to the effect that one Kozac of the Alcohol Tax Unit did not know Geiger or Nardone or any of the defendants prior to the interceptions (R. 52). The motion to strike Geiger's testimony was then denied. Defendants offered to prove that "all of the acts complained of in this indictment became known to the Government solely through or from this wire tapping"

(R. 52–53). After further colloquy on this point (R. 53–55), the court stated that it thought the inquiry should wait. Defendants offered to call Kozac and Geiger, but this offer was rejected and the motion to strike was again denied (R. 55). During the trial the defendants repeated their objections and motions to strike. These were all denied and exceptions taken (R. 94, 138, 142, 152, 157).

At the instance of the defendants, the trial court, upon conclusion of the Government's case, conducted an inquiry for the purpose of ascertaining whether any of the Government's evidence resulted exclusively from wire tapping (R. 265–300). With this end in view, the defendants, out of the presence of the jury (R. 265), called as their first witness Kozac (R. 266), a Government agent who at the first trial had testified as to the contents of certain intercepted messages. Early in the examination of Kozac (R. 268), the court stated that an inquiry would be of no purpose unless the defendants could show that some evidence was derived exclusively from wire-tapping souces. However, the inquiry was continued, with the result that Kozac testified, in substance, that he had not known of the existence of the petitioners (R. 269), or of Geiger (R. 270), or of Geiger's relations to Nardone (R. 270) prior to the interception of the telephone communications.

At this point (R. 270), the court said it thought the evidence "most non-conclusive." After a lengthy colloquy between court and counsel (R. 270–279), the examination of Kozac was resumed, the court ad-

monishing the defendants to attack specific portions of the evidence and to demonstrate that the testimony of any particular witness, or any other evidence, was obtained exclusively from an illegal source (R. 279, 286). The court assured the defendants that it would hear them upon any testimony which would establish that specific evidence was so obtained (R. 279, 286). The court told defendants that they had no right "to go fishing" (R. 285) and finally said (R. 286):

> The Court, after listening to one witness, concludes as a matter of fact that this testimony is incoherent and not conclusive; that the Court now offers to hear an attack on any special part of the testimony that any attorney in the case believes he can fairly attack, as believing it came from no other source, and in default of that I rule the discovery of the complaint has nothing to do with the evidence.

Defendants then offered in evidence Exhibit A, containing testimony of one Martin, a Government agent, in a removal proceeding (R. 287–288), and Exhibit B, records of interceptions and testimony relating thereto received at the first trial (R. 288–289). These were marked for identification, but the court refused to admit them, apparently on the ground (See R. 52, 270, 279, 285, 286, 288–289) that none of the offers of proof made by the defendants did more than show that some of the Government's evidence could have been derived from the intercepted messages, without excluding the possibility of an independent source.

The Government was then permitted to call one William E. Dunigan (R. 290–300), supervisor of the investigation in the instant case, whose testimony was in substance that various telegrams introduced in evidence were not obtained as a result of wire-tapping (R. 290); that much of the information he procured concerning the case was revealed to him by informers both prior to the installation of the wire taps and during the time the "taps" were being taken (R. 290, 292, 295); that the seizure of the vessel "Pronto" did not result from intercepted information; that names of Lancaster and other members of the "Pronto" crew who testified at the trial were never mentioned in any intercepted messages (R. 291, 293); that the identity of Velez [a principal Government witness (R. 177–230)] was not known until he was arrested (R. 293); that the names of certain witnesses, who were members of the crew of the "Southern Sword," were learned after the discontinuation of the wire tapping (R. 266, 293). The witness also stated that if the "taps" had been the only information available to the Government there would never have been a seizure in the case (R. 295).

The testimony of Government agents Kozac and Dunigan showed that the wire-tapping took place during a period extending from December 20, 1935, to approximately March 20, 1936 (R. 266, 267, 290–293). The conspiracy started late in 1934 or early in 1935. The witnesses Kleb and Lancaster were known to the Government as early as January

1935 (R. 102, 296–297). In September 1935 the Coast Guard Cutter "Argo" was trailing the "Pronto," and on October 6, 1935, the disabled "Pronto" was towed by the Coast Guard into New London with a cargo of alcohol aboard (R. 105, 118). The witness Lancaster and the coconspirators Conrad and Van Austin were identified at the time as members of the crew (R. 120). A special assistant to the Secretary of the Treasury was in Belgium in October 1935 observing the loading of cases of alcohol on the "S. S. Rydoon." In November 1935 the "Rydoon" was observed by the Coast Guard off the coast of Newfoundland transferring cases to the "Isabel H" (R. 115, 116, 118–120, 122).

The witness Dunn, a Government agent, testified that on December 19, 1935, he observed the petitioner Hoffman, the defendant Erickson, and coconspirators LeVeque and Geiger at the Hotel Astor and saw them sending a money order and a telegram, Government's Exhibits 13 and 14 (R. 249–251). Witnesses Wald (R. 95–96) and Weiss (R. 98–102) were employees at the Hotel Astor. They identified the petitioners Nardone and Hoffman, the defendant Erickson, coconspirators LeVeque and Kleb, as meeting at the Hotel regularly, sending money orders, and making long-distance telephone calls to Montreal and Nova Scotia. These witnesses were known to the Government prior to the tapping of the telephone wires as appears from Dunn's testimony (R. 249–251).

Saunders and LeVeque were observed by Government agents on November 22, 1935, while participating in an attempt to prevent the confiscation of the cargo of alcohol which had just been illegally landed at Keansburg from the "Pronto" (R. 248–249).

SUMMARY OF ARGUMENT

I

The petitioners were not entitled to conduct an inquiry into the sources of evidence used in convicting them. No intercepted telephone communications were introduced in evidence or otherwise "used" in the trial. Any "use" of the intercepted telephone communications for the purpose of locating witnesses was completed long before the trial so that any violation of the Communications Act involved in such a use would not make the evidence inadmissible, under the well-settled rule that illegality in obtaining evidence not amounting to an invasion of a defendant's constitutional rights does not prevent the use of the evidence.

There is no basis for construing Section 605 of the Communications Act with the liberality which would be appropriate to a construction of constitutional immunities. But even if there were, the evidence in this case would not have been inadmissible since no case has extended the constitutional immunities beyond evidence directly obtained by the unlawful search and seizure. *Benetti* v. *United States*, 97 F. 2d 263 (C. C. A. 9th). Moreover, it is well settled that facts discovered as a result of an extorted con-

fession may be used against the defendant although the confession itself may be barred by the Fifth Amendment.

A rule permitting a general inquiry into the source of the prosecution's evidence would seriously impede the administration of justice by requiring the court to halt in the orderly progress of a cause to consider incidentally a collateral question. It would be impossible in many cases to determine that a particular piece of evidence came from a "tainted" rather than an "innocent" source since many factors may combine to turn an investigation in a particular direction.

II

Even if petitioners were entitled to an inquiry, the record demonstrates that they were permitted to make a full inquiry and that they failed to establish that any part of the Government's case was derived exclusively from wire tapping. The trial court properly called a halt to a proceeding which amounted to nc more than a "fishing expedition" into the Government's case. All offers of proof made by the petitioners were properly rejected since they held forth no promise of showing that the Government's case had not been built up from lawful sources, and it was affirmatively shown that wire tapping occupied a very insignificant place in the preparation of the prosecution.

ARGUMENT

In granting the petition for writ of certiorari this Court limited its review "to the question whether the trial court correctly disposed of petitioners' claim that a portion of the respondent's evidence was procured through the illegal interception of telephone and telegraph messages and the question of the propriety of a preliminary inquiry to ascertain that fact." Preliminarily it should be pointed out that none of the intercepted communications were themselves introduced in the instant case,[1] nor does it appear that the case involves any intercepted telegraph communications. The Government's position is that the petitioners were not entitled to any inquiry into the source of the Government's evidence and that, in any event, they were allowed a full inquiry but failed to sustain the burden of establishing that the Government's evidence was inadmissible.

I

PETITIONERS WERE NOT ENTITLED TO ANY INQUIRY AS TO THE SOURCE OF THE GOVERNMENT'S EVIDENCE

It is clear that petitioners were entitled to an inquiry into the source of the Government's evidence only if it be assumed that evidence obtained as an indirect result of wire tapping would have been inadmissible. Without conceding that the Govern-

[1] These intercepted communications had been introduced at a former trial and this Court reversed the convictions on that ground. *Nardone* v. *United States*, 302 U. S. 379.

ment's case was prepared by the use of unlawfully intercepted communications, we submit that even if the petitioners had been able to prove that the evidence upon which they were convicted had been obtained as an indirect result of wire tapping, the testimony would, nevertheless, have been admissible.

A. SECTION 605 OF THE COMMUNICATIONS ACT WAS NOT VIOLATED BY THE INTRODUCTION OF THE GOVERNMENT'S EVIDENCE AT THE TRIAL

It should be noted in the beginning that the present case turns solely upon a possible violation of Section 605 of the Communications Act of 1934. Petitioners do not contend that the interceptions in the instant case constituted an unlawful search under the Fourth Amendment. On the contrary, they assert that it was unnecessary for the court below to consider, as it did, whether *Olmstead* v. *United States*, 277 U. S. 438, had been overruled, and state that (Pet. 16), "The primary question here is whether in the face of an express legislative ban on the interception of telephone and telegraph and similar messages, Government agents may nevertheless commit the crime of making such interception and use the information thus obtained as evidence in a criminal prosecution."

We submit that there is nothing in the Communications Act which declares inadmissible evidence obtained by the Government as the result of leads secured by wire tapping. Clause 2 of Section 605 was certainly not violated in the instant case, since the Government's witnesses did not "divulge or

publish the existence, contents, substance, purport, effect, or meaning" of any intercepted communication. As the Circuit Court of Appeals pointed out (R. 362), distinguishing *Nardone* v. *United States*, 302 U. S. 379:

> * * * Congress had not also made incompetent testimony which had become accessible by the use of unlawful "taps," for to divulge that information was not to divulge an intercepted telephone call.

Nor do the "use" provisions of clauses 3 and 4 of Section 605 render such evidence inadmissible. Those clauses obviously refer to the use of the intercepted communication itself or the very information contained therein. Their language is clear and specific. Clause 3 provides that—

> * * * no person not being entitled thereto shall receive or assist in receiving any * * * communication * * * and use *the same* or any information *therein contained* * * * *. [Italics supplied.]

and Clause 4 provides that—

> * * * no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, * * * shall * * * use *the same* or any information *therein contained* * * * *. [Italics supplied.]

These clauses would be as broad as the petitioners contend only if there were added the words "or any information derived therefrom."

That the "use" provisions of clauses 3 and 4 of Section 605 do not apply to evidence obtained from leads contained in an intercepted message is supported by the decision of this Court in *Counselman* v. *Hitchcock*, 142 U. S. 547. In this case a witness refused to answer certain questions put to him by a grand jury, on the ground that the answers would be self-incriminating. The District Court held him in contempt and he sought habeas corpus. The Government argued that the witness was sufficiently protected from possible future use of his answers against him by Section 860 of the Revised Statutes, which provided, in part, that:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or *in any manner used* against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: * * * [Italics supplied.]

This Court held that the writ should be granted, on the ground that the witness' constitutional privilege had been invaded. With respect to R. S. § 860, the Court said (p. 564):

> This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not,

> prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion * * *.

It is apparent, therefore, that this Court did not consider that the introduction of evidence obtained from leads divulged by one forced to testify would constitute a violation of the provisions of the section. Accord: *In re Phillips*, 19 Fed. Cas. p. 506, Case No. 11,097 (Dist. Va. 1869). Certainly if the use of evidence indirectly obtained from compelled testimony did not, under Section 860, constitute a "use" of the compelled testimony itself, no more does the use of evidence obtained from leads resulting from intercepted communications constitute a "use" of the communications themselves.

Moreover, even assuming *arguendo* that the Government made use of intercepted communications in seeking out new evidence, when that new evidence was discovered the use of the intercepted information was complete. The introduction of any further evidence discovered by working from this new information cannot be said to constitute a use of the intercepted information, any more than could the occupancy of a building be said to constitute a use of the hammer that was used in its construction. So, too, when the ultimate fact is introduced in

evidence, there is no longer a use of the intercepted communication, but, on the contrary, a use of the new and independent source of information. The point at which "use" ceases must be placed somewhere. We submit that it should be at the first point where information discovered as a consequence of interception is in turn adopted as a new source. Otherwise, the extension might be carried through an absurd number of steps and length of time to a point remote from the original intercepted communication.

It follows therefore that the giving of testimony in court by witnesses whose identity was learned from intercepted communications would not be a use of intercepted communications within the meaning of Section 605. However, it may be conceded, for the purpose of argument, that the intercepted communications were used in violation of Section 605 in obtaining witnesses. But that illegality would have occurred not in the presentation of the evidence, as in the first *Nardone* case, but in the method by which the evidence was secured. This presents the question whether a violation of the statute in procuring evidence renders that evidence inadmissible.

It is well settled that evidence is not rendered inadmissible because obtained as the result of an illegal or criminal act not amounting to a violation of a constitutional provision, and that the courts will not take notice of the manner in which the evidence may have been secured. *Olmstead* v. *United States, supra* (p. 467), and opinion below (R. 362). See also the well-considered opinion of the late Mr. Justice

Cardozo in *People* v. *Defore*, 242 N. Y. 13, certiorari denied, 270 U. S. 657.

B. SECTION 605 SHOULD NOT BE CONSTRUED AS BROADLY AS IF IT WERE A CONSTITUTIONAL PROVISION

Even though petitioners expressly disclaim any intention to raise the question as to whether the *Olmstead* decision has been overruled, they seem to contend that Section 605 of the Communications Act should be so construed as to afford a protection as broad as would be that of the Fourth and Fifth Amendments. They take the position that evidence indirectly obtained from leads resulting from a violation of the Constitution would not be admissible, and urge that a similar construction should be given to the statutory prohibitions of Section 605 (Pet. 16–17).

We submit, however, that the petitioners' contention cannot be sustained for the following reasons:

(1) A statute should not be interpreted so as to effect any change in the common law beyond that which is clearly indicated. All statutes in derogation of the common law are to be strictly construed. *Shaw* v. *Railroad Co.*, 101 U. S. 557, 565; *Douglass* v. *Lewis*, 131 U. S. 75, 85; *Brunswick T. Co.* v. *National Bank of Baltimore*, 192 U. S. 386, 390; *Northern Securities Company* v. *United States*, 193 U. S. 197, 361 (concurring opinion); *United States* v. *Breeding*, 207 Fed. 645, 649 (W. D. Va.); *United States* v. *Sutherland*, 214 Fed. 320, 323 (W. D. Va.); *Wood* v. *White*, 97 F. (2d) 646, 648 (App. D. C.). That

Section 605 of the Communications Act is in derogation of the common law sufficiently appears from a comparison of the *Olmstead* case and the *Nardone* case, and the interpretation urged by petitioners would certainly effect a change in the common law beyond any declaration in the statute.

(2) Courts regularly distinguish between the liberalty with which a constitutional provision should be construed and the strict interpretation to be given to statutes. The reasons for such a distinction lie in the difference between the broad, fundamental and relatively inflexible provisions of a constitution as contrasted with the more detailed and perhaps more transient policies represented by statutes. The comparative ease with which a statute may be amended has also been pointed to in explaining the difference of approach. See *People* v. *Defore*, 242 N. Y. 13, 23, certiorari denied, 270 U. S. 657; cf. *Legal Tender Case*, 110 U. S. 421, 439.

(3) The petitioners' contention is merely an attempt, in the guise of a purported rule of statutory construction, to evade the well settled principle that only a violation of the Constitution will justify the exclusion of evidence. *Weeks* v. *United States*, 232 U. S. 383; *Olmstead* v. *United States*, 277 U. S. 438, 467-468, and cases cited. Of course, Congress may by direct legislation prohibit the admission of evidence obtained in a certain manner, but Section 605 of the Communications Act of 1934 is not a "rule of evidence" statute, nor was it so construed in the first *Nardone* decision. See Government's

brief in *Weiss et al* v. *United States*, No. 42, present Term, pp. 35–36.

C. THE GOVERNMENT'S EVIDENCE WOULD NOT BE INADMISSIBLE EVEN IF SECTION 605 WERE CONSTRUED WITH THE LIBERALITY APPROPRIATE TO CONSTITUTIONAL INTERPRETATION

Even if Section 605 of the Communications Act be construed to afford a protection as broad as that of the Fourth and Fifth Amendments, we submit that evidence resulting from leads obtained by interceptions would not be rendered inadmissible under the rules enunciated in any decision of this Court. The petitioners do not cite, nor have we been able to find, any decision of this Court which goes to the extent of holding that not only the unconstitutionally seized evidence itself is inadmissible, but also that evidence obtained as a result of leads arising from the illegally seized evidence is incompetent. *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, strongly relied upon by the petitioners, certainly does not apply any such rule. There the question presented was simply whether a defendant could be compelled by subpoena to produce before a grand jury documentary evidence, knowledge of the existence of which had been acquired through a previous unlawful search and seizure. It is apparent, therefore, that the case is authority only for the well settled proposition that the very evidence which was the object of the search shall not be used against the defendant. While this Court said that the evidence could not be obtained "in the way proposed", it also

stated that the facts discovered do not "become sacred and inaccessible". Moreover, in the *Silverthorne* case this Court was concerned with an attempt to force the defendant himself to produce self-incriminating evidence.

As far as the lower Federal courts are concerned, the only case which we have been able to find ruling squarely upon the question of the admissibility of evidence discovered in consequence of information contained in unlawfully seized documents is *Benetti* v. *United States*, 97 F. (2d) 263 (C. C. A. 9th). In this case the defendant was indicted for tax evasion. Upon appeal from conviction he urged that error had been committed in the refusal to direct a verdict in his favor on the ground that revenue agents had learned of the commission of the crime by examining records of a prohibition case against him. The indictment in the prohibition case had been quashed and the evidence suppressed on the ground that defendant's premises had been searched without warrant. The conviction in the income tax case was affirmed by the Circuit Court of Appeals for the Ninth Circuit, the Court saying (p. 267):

> As supporting his position, appellant cites *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426; *Gouled* v. *United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647. These authorities do not support any such extreme contention as is here made. In these cases it was sought to make use of the

very evidence that had been suppressed. There was nothing of that kind in this case. Here the most that could be said was that, as a result of the unlawful seizure, the government was made aware that appellant was illegally engaged in selling intoxicating liquor which aroused suspicion that appellant was evading full payment of his income tax. That this caused the investigation whereby the government came into possession of other perfectly legal evidence which was in every way competent and admissible, unless appellant's claim of immunity is sustained. [Sic]

* * * * *

Even if the crime for which appellant was indicted was revealed by an illegal search and seizure in another case, he would not be immune from prosecution and his conviction cannot be set aside if sustained by evidence obtained from independent sources and no evidence illegally seized was used against him. Constitutional provisions forbidding the use of evidence secured in an illegal way are not to be construed to mean that the facts thus disclosed are forever inaccessible. In the opinion in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426, relied upon by appellant, there is language used by Justice Holmes which sustains this view. At page 392, 40 S. Ct. at page 183, it was said:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not

> be used before the Court but that it shall not be used at all. *Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others* * * *."

There have been contrary intimations but no direct holdings in the Second Circuit. Thus, in *Filter* v. *United States*, 258 Fed. 567, 574–575, the Circuit Court of Appeals for that circuit affirmed a conviction after pointing out that the trial court had adequately safeguarded the defendant's rights by excluding all testimony "learned indirectly as the result of the contents" of the illegally seized papers. Of course, this is not equivalent to a ruling that the admission of such evidence would have been error but constitutes a holding only that such evidence had not in fact been used in the trial court. It is worth noting that the court distinguished the *Weeks* case, saying that it had no inclination to extend the rule therein to the facts in the case before it. The court added (pp. 574, 575):

> The illegal acts of the subordinate agents of the United States should not afford to the clearly guilty a means of escape from a just punishment unless conviction has been secured through the use of documents or other evidence containing self-incriminating matter obtained by illegal means.

The statement by Judge Learned Hand in *United States* v. *Kraus*, 270 Fed. 578, 580 (S. D. N. Y.), that "The prosecution may not use at the trial or in its

preparation any information obtained from their [unlawfully seized papers] scrutiny" is clearly dictum, for the court was acting upon a petition for the return of the very papers which had been illegally seized. It is significant, moreover, that Judge Hand, in writing the opinion in the instant case in the court below, cited the *Kraus* case without feeling bound to follow it.

A single example will demonstrate the absurd consequences which would result if the petitioners' construction were followed. The Government, in investigating a crime, intercepts a telephone conversation by "Z" and obtains the name of "A." In questioning "A," the identity of "B" is revealed. "B," in turn, uncovers "C," and so on through any number of steps to "X," who reveals an entirely new and unsuspected serious offense also committed by "Z." "X" is the only witness to "Z's" crime and his testimony is necessary in obtaining a conviction. Yet, if petitioners' contention be upheld, "Z" is completely immune because the existence of his crime and the only witness against him were both discovered through leads initially opened by wire tapping. Again, we submit, a line must be drawn. Unless it is placed so as to render inadmissible only the very evidence initially discovered, there is no other point of stoppage, once the realm of indirect evidence is entered.

Moreover, we submit, evidence so disclosed is not strictly speaking a part of the evidence discovered by an unlawful search or by interceptions. It is, to be

sure, evidence the Government was enabled to produce because of such search or interceptions, but it is also equally clearly evidence which was not contained in the intercepted communication.[2]

A complete analogy to the rule governing the admissibility of evidence resulting from involuntary confessions exists in the instant case. It has long been the settled common-law rule that even though an involuntary confession is not admissible, facts and information discovered in consequence of such a confession are competent.[3]

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[2] See *McQueen* v. *Commonwealth*, 196 Ky. 227, where the court applied this reasoning to facts revealed in an involuntary confession, although Kentucky had, prior to this time (*Youman* v. *Commonwealth*, 189 Ky. 152) adopted the doctrine of the *Weeks* case.

[3] "The rule is settled that, notwithstanding the inadmissibility of the confession, all facts discovered in consequence of the information given by the accused, and which go to prove the existence of the crime of which he is suspected, are admissible as testimony." 2 *Wharton's Criminal Evidence*, 995 (11th ed., 1935), citing cases: *Wigmore on Evidence*, (2d ed.), §. 859, and cases cited; *United States* v. *Richard*, Fed. Cas. No. 16154; *United States* v. *Hunter*, Fed. Cas. No. 15, 424 See also *Lewis* v. *State*, 220 Ala. 461; *Shufflin* v. *State*, 122 Ark. 606; *Osborn* v. *People*, 83 Colo. 4; *Jones* v. *State*, 75 Ga. 825; *People* v. *Ascey*, 304 Ill. 404; *State* v. *Moran*, 131 Ia. 645; *State* v. *Turner*, 82 Kan. 787; *McQueen* v. *Commonwealth*, 196 Ky. 227; *Belote* v. *State*, 36 Miss. 96; *State* v. *Simpson*, 157 La. 614; *Dupuis* v. *State*, 14 Ohio App. 67; *State* v. *Dixson*, 80 Mont. 181; *Walrath* v. *State*, 8 Neb. 80; *State* v. *Riddle*, 205 N. C. 591; *Duffy* v. *People*, 26 N. Y. 588; *State* v. *Motley*, 7 Rich. Law 327 (S. C.); *Collins* v. *State*, 169 Tenn. 393; *Bryant* v. *State*, 131 Tex. Cr. R. 274; *State* v. *Cocklin*, 109 Vt. 207.

This Court has squarely and definitely based the exclusion of involuntary confessions upon the self-incrimination clause of the Fifth Amendment. *Bram* v. *United States*, 168 U. S. 532.[4] See also *Weeks* v. *United States*, 232 U. S. 383, 392; *Wan* v. *United States*, 266 U. S. 1, 17 (n. 6). There can be no real distinction between evidence discovered by means of an involuntary confession and that discovered by means of interception, since the objection to both springs from the same source. It would not seem logical that evidence indirectly obtained by wire tapping should be rendered inadmissible when an involuntary confession usually represents the results of a far more aggravated invasion of privacy.

This Court, in the *Bram* case (at page 543) said:

> A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent and of the safeguards which it was its purpose unalterably to secure, will make

[4] In the *Bram* case this Court said (p. 542):

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' * * *"

> it clear that the generic language of the Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted, * * *.

Since the common law did not exclude evidence discovered in consequence of an involuntary confession, it follows that such evidence is not excluded by the Fifth Amendment. In this connection it is important to note that, so far as we have been able to discover, even those states which have adopted the rule excluding evidence obtained by an unlawful search and seizure, nevertheless, continue to admit inculpatory facts discovered in consequence of an involuntary confession.[5] In *Smith* v. *State*, 166 Miss. 893, the Supreme Court of Mississippi which had theretofore placed extorted confessions in the same category with unlawful searches and seizures[6] refused to exclude evidence obtained as the result of involuntary confessions.

In view of the above, it follows that evidence indirectly discovered in consequence of interceptions is not rendered inadmissible by the Communications Act, since even the petitioners do not contend that that statute should be construed more broadly than is the Fifth Amendment.

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[5] See, for example, decisions admitting such evidence subsequent to the adoption of the rule excluding evidence obtained by an unlawful search and seizure: *McQueen* v. *Commonwealth*, 196 Ky. 227; *Smith* v. *State*, 166 Miss. 893; *State* v. *Dixson*, 80 Mont. 181; *Collins* v. *State*, 169 Tenn. 393; *Bryant* v. *State*, 131 Tex. Cr. R. 274.

[6] *Tucker* v. *State*, 128 Miss. 211, 223.

D. A RULE PERMITTING INQUIRIES OF THE TYPE SOUGHT IN THIS CASE WOULD SERIOUSLY IMPEDE THE ADMINISTRATION OF JUSTICE

From a practical standpoint no argument could be more persuasive against petitioners' view than the immense difficulties which trial courts would encounter in attempting to carry out a rule entitling a party to inquire as to the sources of evidence which is not a direct product of an illegal act but merely obtained as an indirect consequence thereof. The experience of the trial court in the present case is a demonstration of this fact. Against a volume of testimony given by a score of witnesses, there was launched an indiscriminate, non-specific attack with which the court was helpless to deal. The Circuit Court of Appeals itself, as its opinion shows, was at a loss to prescribe an appropriate procedure for an inquiry of the character undertaken, or to mark out the extent to which the "original taint pervades the last scrap of evidence eventually found" (R. 363). The situation is far more complicated than in *Watson* v. *United States*, 6 F. (2d) 870 (C. C. A. 3d) cited in the opinion of the Circuit Court of Appeals (R. 361). In the *Watson* case a conviction was reversed because of the trial court's refusal to permit a Government witness to be cross-examined for the purpose of showing that the witness' information was derived directly from papers seized in violation of the Fourth Amendment. No such cross-examination would have sufficed in the instant case, for none of the witnesses testified from any illegally obtained

communications. This was so clear that defense counsel did not even attempt to cross-examine on this point. Only a general drag-net inquiry, covering every step in an investigation conducted by 45 to 55 agents (R. 293) could have established how much, if any, of the Government's case rested ultimately on wire tapping—*unless* the petitioners had been willing, as they apparently were not, to accept the testimony of the only person qualified to give an over-all view of the preparation of the Government's case, the man in charge of the investigation.

Moreover, the difficulties will not end with the inconvenience of receiving a large mass of testimony upon a matter collateral to the question of defendant's guilt. When all this evidence as to the source of prosecution testimony is received there will still remain the sore question of assigning to each "scrap of evidence" a "tainted" source or an innocent one. Will it not invariably be found that every step in building up the case prior to trial is the consequence of many antecedent causes? Conspirator "X's" name was known for a long time because of his connection with previous illicit activities. Agent "A" reports seeing him with "Y", definitely involved in the crime under investigation. Agent "B" discovers an apparent innocent explanation for the association of "X" with the conspirators. Agent "C" hears "X's" name mentioned in an intercepted telephone call between two known members of the conspiracy. Perhaps in the end the only testimony introduced against "X" will be a letter taken from his waste-

basket by a janitor. Who can say what value should be assigned to each clue in a series which leads to "X's" conviction? In this respect a collateral inquiry presents far more difficulties than would a proceeding under the Communications Act to punish a violation under Section 605, for in such a proceeding it would be necessary to establish only that the defendant had wilfully intercepted and divulged the contents of an interstate telephone communication. Communications Act of 1934, Section 501 (U. S. C., Title 47, Sec. 501).

Furthermore, a new field would be opened for appeals on technical issues unrelated to the substantial question which the trial was to determine. Appellate courts will be drawn into controversies over the existence of prejudicial error in this subsidiary proceeding to determine the competence of evidence to be offered in the main case.

Shall the inquiry be conducted in advance of trial or will objection be entertained in the course of the proceedings? As the Circuit Court of Appeals pointed out (R. 363) the conduct of a general inquisition like the one sought in the present case in advance of trial would simply amount to a review of the Government's evidence—a profitable maneuver for the defense regardless of its success in connecting wire-tapping with the Government's case. Furthermore, an inquiry in advance could hardly bar defendant from further objection during the trial, for the Government might introduce evidence not known to exist at the time of the preliminary inquiry, or not

then expected to be used. In the usual case, also, the defendant may not come to suspect that his wires have been tapped until he is surprised by particular testimony offered at the trial and hence could not demand an inquiry before that time. Indeed, one may wonder whether the inquiry could ever come too late, and whether convicts now imprisoned should not, if petitioners' view be correct, be allowed to show on *habeas corpus* that conviction had been obtained by means of wire-tapping until now unsuspected. Cf. *Beard* v. *United States* 99 F. 2d 750 (App. D. C.), certiorari denied 306 U. S. 655.

It is submitted that just such delays and obstruction of justice as have been mentioned furnish the reason for the adoption by courts of the rule that evidence should be admissible regardless of any illegality by which it was obtained, and the corollary principle that a trial will not be interrupted for the purpose of conducting a hearing on the source of the evidence. So valuable is the principle that it has retained its vitality, with appropriate modifications, even where constitutional privileges against unreasonable searches and seizures and compulsory self-incrimination are involved. *Adams* v. *New York*, 192 U. S. 585, 595. See also *Weeks* v. *United States*, 232 U. S. 383, 395-396; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392; *Marron* v. *United States*, 275 U. S. 192, 198. In the *Weeks* case this Court held that evidence seized by agents of the Federal Government in violation of Constitutional provisions must be excluded if a timely motion to

compel return had been made before trial. This Court has further ruled that such a motion before trial is unnecessary if the defendant had no knowledge until the trial that an illegal seizure had been made, *Gouled* v. *United States*, 255 U. S. 298, 305; or if the facts were undisputed, *Agnello* v. *United States*, 269 U. S. 20, 34; *Amos* v. *United States*, 255 U. S. 313. In no case that the Government has been able to find was any inquiry permitted to go beyond cross-examination of the prosecution witnesses, and in every case where this Court has sanctioned the exclusion of evidence the evidence in question was that directly obtained by the unlawful act. On the other hand, in the instant case, the facts are very much in dispute; the origin of the evidence was very difficult of ascertainment; the evidence sought to be excluded was not evidence obtained by wire-tapping; and the basis of exclusion could not be established solely by cross-examination. As pointed out by the court below (R. 363), the evidence here "does not bear the ear-marks of its acquisition." To determine its origin would have required a "fishing expedition" into the background of the Government's case, a complete and lengthy independent trial or inquiry. As pointed out in the Note to *State* v. *Turner*, 82 Kan. 787, in 136 AM. St. Rep. 129, 135, 142, such an inquiry would require the court "to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of * * * litigation, and which

is wholly independent thereof." See *Weeks* v. *United States*, 232 U. S. 383, 396.

If this is the attitude of courts where invasions of constitutional rights were charged, we submit that certainly no greater protection should be thrown about rights established by a statute, as in the present case.

For the reasons stated, we submit that the petitioners were not entitled to any inquiry as to the source of the Government's evidence. Therefore, it follows that the trial court did not commit reversible error in limiting any inquiry which the petitioners attempted.

II

PETITIONERS WERE ALLOWED A FULL INQUIRY BUT FAILED TO MEET THE BURDEN OF PROOF WHICH DEVOLVES ON ONE WHO MOVES TO STRIKE OUT EVIDENCE

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY BARRING A "FISHING EXPEDITION" INTO THE GOVERNMENT'S CASE

It must be emphasized that the trial court at no time refused to hear objections to specific portions of the Government's evidence and testimony in support of such objections. Indeed the court specifically invited defense counsel to present such testimony (R. 279, 286). The court called a halt only when it became apparent that this opportunity was to be employed "to go fishing" into the Government's case (R. 285) and that the testimony being adduced was, and would continue to be, inconclusive (R. 285, 286).

No proposition is better established than that which forbids general inquiries into an opponent's evidence. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298; *Federal Trade Commission* v. *Hammond, Snyder & Company*, 267 U. S. 586; *Hale* v. *Henkel*, 201 U. S. 43, 76; *Carpenter* v. *Winn*, 221 U. S. 533, 540.

Also, it is well settled that determinations by a trial court as to matters preliminary to the admission or exclusion of evidence should be accorded finality except in the clearest cases of abuse of discretion. *Stillwell Mfg. Co.* v. *Phelps*, 130 U. S. 520; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94. See *Wigmore on Evidence* (2d ed. 1923) §16 (c). Thus, the competency of an infant to testify has been held to be a matter "peculiarly within the province and discretion of the court." *Oliver* v. *United States*, 267 Fed. 544, 547 (C. C. A. 4th). So also as to the qualifications of an expert. *Citizens Bank and Trust Co. of Middlesboro, Ky.* v. *Allen*, 43 F. (2d) 549 (C. C. A. 4th); *Morton Butler Timber Co.* v. *United States*, 91 F. (2d) 884 (C. C. A. 6th). And this is the rule even where the question involved is whether evidence was seized in violation of the Fourth Amendment. *Kovach* v. *United States*, 53 F. (2d) 639 (C. C. A. 6th); *United States* v. *Bianco*, 96 F. (2d) 97 (C. C. A. 2d).

Accordingly, the refusal by the trial court in the instant case to strike the Government's evidence should not be disturbed, since that ruling on a preliminary question was supported by the substantial,

if not conclusive, testimony of Dunigan, the agent who directed the investigation. See *infra*, pp. 44–46.

B. PETITIONERS' OFFERS OF PROOF WERE PROPERLY REJECTED

Although the trial court gave petitioner full opportunity to attack the admissibility of any specific part of the testimony which could be shown to be derived exclusively from unlawful wire tapping, it properly rejected the offers of proof made by the defense. It was apparent upon the face of every such offer that the proffered testimony or records would do no more than show that some of the Government's evidence could have been derived from intercepted messages. Not a single offer promised even a possibility of excluding an independent source. Such evidence, the court held, was inconclusive and immaterial without proof that the Government had not in fact derived its information from innocent sources. Obviously, if the Government could and did establish the crime by evidence independent of wire tapping, the existence of wire tapping would not preclude a conviction.

The reports of federal decisions are surprisingly barren with reference to the law relating to offers of proof. We must, therefore, turn to state decisions in considering this subject. It is well settled that rejection of an offer to prove a negative is not erroneous where the offer does not include facts sufficient to establish the negative conclusion. *Etter* v. *Dugan*, 1 Texas Unreported Cases, 175, 180 ("The offer to

prove that the signature was not the handwriting of L. Bostick was not * * * equivalent to an offer to prove the attestation a forgery, or not the authorized act of Bostick."); *Carlton* v. *State*, 55 Tenn. 16, 20 (Suit on a comptroller's certificate for unpaid balance of taxes due; defendants offer to prove some receipts was rejected; "it is obvious that the production of *some* receipts, showing some payments would not contradict, or tend to contradict, the statement of the Comptroller that a balance was due."); *Manning* v. *Den*, 90 Cal. 610, *Williams* v. *Oates*, 212 Ala., 396.)

The foregoing rule is but a phase of the general proposition that "the rejection of testimony as to a solitary circumstance, which is incompetent unless other testimony be supplied, is not, in the absence of any offer to supply it, legal error." *Pier* v. *Speer*, 73 N. J. L. 633, 636; accord *Indianapolis Furnace and Mining Co.* v. *Herkimer*, 46 Ind. 142; *H. M. Farnham & Sons* v. *Wark*, 99 Vt. 446; *Borden* v. *Lynch*, 34 Mont. 503. Moreover, in passing upon alleged errors in rejecting offers of proof, courts have said that the burden is upon the person making the offer to establish the admissibility of the evidence. *Burns* v. *Leath*, 236 Ala. 615, *Standish* v. *Newton*, 103 Vt. 85. It has also been held, in reviewing the rejection of an offer of proof, that an offer susceptible of several interpretations should be construed against the person making the offer. *Buck* v. *Troy Aqueduct Co.*, 76 Vt. 75; *Roe* v. *Schweitzer*, 55 Utah 204.

Applying the foregoing principles to the facts of the present case, it is clear that no error was committed in rejecting petitioners' offer of proof. The only proof which might have been admissible, to wit, proof that the Government's evidence was *not* derived from sources independent of wire tapping, was never offered, and without such proof, evidence tending to show that the Government's information might have been derived from wire tapping was clearly incompetent.

The court interrupted the questioning of Kozac, a Government investigator who had overheard the intercepted messages, only when it became apparent that a continuation of his testimony would establish no more than that *he* had secured certain information by wire tapping. The complete irrelevance of this testimony becomes clear when it is noted that Kozac was not a Government witness except to identify a sample of alcohol. Geiger, whom the defendants offered to call (R. 55), could certainly not have testified that his connection with defendants was learned by the Government through wire tapping, exclusively. It is equally clear that records of intercepted messages or of testimony with respect thereto in other proceedings (R. 51–53; 287–288) would show only that Geiger's name and his connection with defendants were mentioned in the intercepted messages. They would in no way establish that the Government had not learned of these circumstances by independent means. In the absence of such proof, the court had no alternative but to

deny the motion to strike the Government's evidence, since wire tapping does not render inaccessible to independent search the facts which have also been exposed by illegal interception. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *United States* v. *Reed*, 96 F. (2d) 785 (C. C. A. 2d), certiorari denied 305 U. S. 612. Any other view would mean that wire tapping, by subordinate Government officers, would confer complete immunity upon an accused and there would have been no occasion for retrying the petitioners after the first *Nardone* decision.

As to petitioners' general offer to prove "that all of the acts complained of in this indictment became known to the Government solely through or from this wire tapping" (R. 52–53) and similar offers made elsewhere in the record, these were properly disregarded by the trial court. The decisions are unanimous that an offer of proof must be of specific facts and not mere conclusions. As the Supreme Court of Oregon said in *Columbia Realty Investment Co.* v. *Alameda Land Co.*, 87 Ore. 277, 296:

> An offer of proof should state facts rather than conclusions. Its language should be not vague, but distinct; not general, but specific. It is not sufficient that it state the ultimate facts in language appropriate to a pleading; the evidentiary facts must be set out.

And in *Horowitz* v. *Blay*, 193 Mich. 493, the Supreme Court of Michigan said of an offer to prove that

certain men "were incompetent, inefficient, and negligent":

> This offer was not sufficiently definite as to acts of negligence to make its rejection erroneous. It did not give the court any information as to the facts plaintiff could prove bearing upon negligence, but simply stated counsel's opinion as to their legal effect. If the proofs had been received, it might have transpired that counsel was mistaken, and that they had no tendency to show negligence, or that the negligence shown had no relation to the injury. This court cannot justly reverse a case because of the exclusion of testimony unless it is able to see that the testimony, if it had been received, might have changed the result.

See also *Central Pacific Railroad* v. *California*, 162 U. S. 91, 117; *Lewis W. Thompson & Co.* v. *Conran-Gideon Special Road District*, 323 Mo. 953; *Boise Association of Credit Men* v. *U. S. Fire Insurance Co.*, 44 Idaho 249; *Shirley* v. *Madsen*, 52 S. D. 43.

C. THE BURDEN WAS ON PETITIONERS TO SHOW THAT THE GOVERNMENT'S EVIDENCE WAS INADMISSIBLE

Since all the evidence offered by the Government was on its face relevant and material, it devolved upon the petitioners to demonstrate the extraneous circumstances rendering it inadmissible. See *Wigmore on Evidence* (2d ed.) §10. Commonly applied corollaries of this general principle are the rules that evidence not objected to by the opposing party is admissible, although upon objection it might

properly have been excluded; that objections must be specific; that the overruling of objections to testimony based on invalid grounds is not reversible error although there were in fact good grounds for excluding the testimony.

With specific reference to cases of alleged invasions of constitutional immunities, many Federal courts have held that the burden is on the defendant moving to suppress evidence to establish the facts necessary to render the evidence inadmissible. *Samson* v. *United States*, 26 F. (2d) 769 (C. C. A. 1st); *United States* v. *Phillips*, 34 F. (2d) 495, 497 (N. D. N. Y.); *United States* v. *Derrick*, 40 F. (2d) 309 (M. D. Pa.); *United States* v. *Lane*, 51 F. (2d) 241 (E. D. N. Y.); but see *Kovach* v. *United States*, 53 F. (2d) 639 (C. C. A. 6th); *United States* v. *Kraus*, 270 Fed. 578 (S. D. N. Y.). This Court and some of the lower Federal courts have refused to recognize any presumption against the admissibility of confessions; involving possible violations of the Fifth Amendment, the burden being placed on the defendant to show inadmissibility. *Sparf* v. *United States*, 156 U. S. 51; *Perovich* v. *United States*, 205 U. S. 86; *Gray* v. *United States*, 9 F. (2d) 337 (C. C. A. 9th); *Murphy* v. *United States*, 285 Fed. 801 (C. C. A. 7th); *Hartzell* v. *United States*, 72 F. (2d) 569, 577 (C. C. A. 8th). And this position is also approved in *Wigmore on Evidence* (2d ed.) § 860. The Second Circuit has apparently taken the opposite view. *Litkofsky* v. *United States*, 9 F. (2d) 877 (C. C. A. 2d).

With this attitude in the cases of extorted confessions and other violations of constitutional privileges, it would be difficult to justify a different view where only the violation of a statute is involved.

The decision of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Bonanzi*, 94 F. (2d) 570 (C. C. A. 2d), that the burden was on the prosecution to establish the intrastate character of telephone messages, receives no support whatever from the only case cited for this point in the decision. Nor is the reasoning persuasive. It is based on the fears of the impossible burden on a defendant who denies that he made the telephone call but who will, nevertheless, be required to establish the interstate character of the call in order to exclude it. The difficulty envisioned is a difficulty which every defendant who pleads alibi or mistaken identity faces. If he can establish that defense he needs no other. Otherwise, indeed, he will be called upon to avoid the effect of evidence of facts with which he denies all connection. It may be noted, moreover, that the instant case comes up from the same Circuit Court of Appeals which ruled on the *Bonanzi* case. Yet the court below, in spite of the *Bonanzi* decision, raises, but does not decide, the question as to the burden of proof (R. 361).

D. IT WAS CONCLUSIVELY SHOWN THAT THE GOVERNMENT'S CASE WAS NOT DERIVED FROM WIRE TAPPING

It is obvious that the only person qualified to testify as to the extent to which wire tapping was used as a source of evidence was William E. Dunigan,

who supervised the Government's investigation (R. 290). And it is of some significance that defense counsel failed to put him on the stand when they inaugurated the inquiry into the sources of the evidence. Dunigan's testimony, when the Government put him on the stand, left no room for doubt not only that the Government's case was not derived exclusively from wire tapping, but that no material portion of the case stemmed from this source. The tapping of telephones took place over a period extending approximately from December 20, 1935, to March 20, 1936 (R. 266, 290–293). Dunigan stated that he knew of LeVeque, Nardone, Hoffman, Geiger, Saunders, and Erickson prior to December 20, 1935, from informers (R. 292, 294, 298). Kleb was known to him as a result of the "Monolulo" incident (R. 293). The existence of Velez, perhaps the most important single witness for the Government (R. 177–230), was learned after March 20, 1936 (R. 293). The seizure of the "Pronto" on January 20, 1936, did not result from wire tapping (R. 293). Gottfried's name appeared first in an intercepted message, but his connection with the case was established only as a result of information furnished by Velez (R. 295–296). Geiger's name was mentioned in intercepted telephone messages, but there was no "inkling or intimation" of his capacity as radio operator. This was an inference which the investigators drew from the messages plus other information (R. 297). Wire tapping was "only incidental" in the investigation (R. 293). Only three of the 45 to 55 agents working on the case intercepted telephone communications

(R. 293). The Government would never have made a seizure in the case upon the basis of the telephone calls alone (R. 295).

It is clear that no inquiry which defendants might have made could have revealed more as to the use made of the intercepted telephone communications than was revealed by Dunigan. And his testimony shows that no part of the Government case was derived exclusively from wire tapping. Clearly the fact that a tainted source is available along with an innocent source cannot bar the use of the innocent source of evidence, under the principle laid down by Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. See also *United States* v. *Reed*, 96 F. (2d) 785 (C. C. A. 2d), certiorari denied, 305 U. S. 612.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

ROBERT H. JACKSON,
Solicitor General.
O. JOHN ROGGE,
Assistant Attorney General.
WILLIAM W. BARRON,
Special Assistant to the Attorney General.
GEORGE F. KNEIP,
LOUIS B. SCHWARTZ,
JOHN F. McCARTNEY,
W. MARVIN SMITH,
Attorneys.

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SUPREME COURT OF THE UNITED STATES.

No. 240.—October Term, 1939.

Frank Carmine Nardone, Nathan W. Hoffman and Robert Gottfried, Petitioners,

vs.

United States of America.

On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

[December 11, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

We are called upon for the second time to review affirmance by the Circuit Court of Appeals for the Second Circuit of petitioners' convictions under an indictment for frauds on the revenue. In *Nardone* v. *United States*, 302 U. S. 379, this Court reversed the convictions on the first trial because they were procured by evidence secured in violation of § 605 of the Communications Act of 1934 (c. 652, 48 Stat. 1064, 1103; 47 U. S. C., § 605). For details of the facts reference is made to that case. Suffice it here to say that this evidence consisted of intercepted telephone messages, constituting "a vital part of the prosecution's proof".

Conviction followed a new trial, and "the main question" on the appeal below is the only question open here—namely, "whether the [trial] judge improperly refused to allow the accused to examine the prosecution as to the uses to which it had put the information" which *Nardone* v. *United States, supra*, found to have vitiated the original conviction. Though candidly doubtful of the result it reached, the Circuit Court of Appeals limited the scope of § 605 to the precise circumstances before this Court in the first *Nardone* case, and ruled that "Congress had not also made incompetent testimony which had become accessible by the use of unlawful 'taps', for to divulge that information was not to divulge an intercepted telephone talk." 106 F. (2d) 41.

The issue thus tendered by the Circuit Court of Appeals is the broad one, whether or no § 605 merely interdicts the introduction into evidence in a federal trial of intercepted telephone conversa-

tions, leaving the prosecution free to make every other use of the proscribed evidence. Plainly, this presents a far-reaching problem in the administration of federal criminal justice, and we therefore brought the case here for disposition. 308 U. S. —.

Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design. In accommodating both these concerns, meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated.

We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in *Nardone* v. *United States, supra.* That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because "inconsistent with ethical standards and destructive of personal liberty." 302 U. S. 379, 384. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty." What was said in a different context in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392, is pertinent here: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." See *Gouled* v. *United States,* 255 U. S. 298, 307. A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose.

Here, as in the *Silverthorne* case, the facts improperly obtained do not "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it" simply because it is used derivatively. 251 U. S. 385, 392.

In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of § 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfuly employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. Like mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into the legitimacy of evidence in the Government's possession. So to read a Congressional prohibition against the availability of certain evidence would be to subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the law's officers. Therefore claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury. And if such a claim is made after the

trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim. The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

We have dealt with this case on the basic issue tendered by the Circuit Court of Appeals and have not indulged in a finicking appraisal of the record, either as to the issue of the time limit of the proposed inquiry into the use to which the Government had put its illicit practices, or as to the existence of independent sources for the Government's proof. Since the Circuit Court of Appeals did not question its timeliness, we shall not. And the hostility of the trial court to the whole scope of the inquiry reflected his own accord with the rule of law by which the Circuit Court of Appeals sustained him, and which we find erroneous.

The judgment must be reversed and remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice McReynolds is of opinion that the Circuit Court of Appeals reached the proper conclusion upon reasons there adequately stated and its judgment should be affirmed.

Mr. Justice Reed took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.